

# THE MODERN INTERNATIONAL LAW OF NECESSITY WITH AND BEYOND ECONOMICS:

## A RESPONSE TO ALAN SYKES ON INVESTMENT TREATY MAKING AND INTERPRETATION

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*The evolution of the concepts used in a treaty does not necessarily imply that protection of general interests in the international community will be strengthened.*<sup>1</sup>

*... the interpretation of treaties is an art rather than a science ... the process of interpretation must begin and end with the actual text to be interpreted.*<sup>2</sup>

*... the international system makes law through multiple processes and in multiple settings ... The problem for the international lawyer in the short term is to develop a method for identifying and properly characterizing the different forms of law, identifying those fora in which one or the other is likely to be deemed dispositive, assessing the projected implementability of particular normative statements in different situations, and using the terms accurately and responsibly.*<sup>3</sup>

#### I. CONTRACT V. TREATY 'NECESSITY': REGULATORY FLEXIBILITY AND MORAL HAZARD

International treaties express binding sovereign decisions to regulate State conduct, in a manner that has some analogies<sup>4</sup>

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1. Giorgio Gaja, *The Protection of General Interests in the International Community: General Course on Public International Law (2011)*, in 364 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 2012, at 9, 66 (2014).

2. R.Y. Jennings, *The Law of Treaties: General Course on Principles of International Law*, in 121 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 544 (1967).

3. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 26, 29 (Rüdiger Wolfrum & Volker Röben eds., 2005).

4. See HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 3-6 (1927) (explaining the point of contact private contract law has with international public law, and positing that while there is a close relation between the two branches, there are also problems with analogizing private law and international public law).

– but also “glaring institutional differences”<sup>5</sup> – with the pure system of private contract. Much like ordinary contracts, treaties seek to define the terms of performance of the States parties to these agreements, but treaties cannot fully anticipate every situation of deviance. Unlike ordinary contracts, however, treaties are concluded through the direct exercise of sovereign power, with States concluding such treaties undertaking to be internationally responsible to fellow State parties to a treaty, and in some instances, also to non-State parties. While an ordinary contract breach triggers a private cause of action for liability, a treaty breach gives rise to an international claim. In its Judgment on Jurisdiction in the *Anglo-Iranian Oil Company* case, the International Court of Justice pointedly stressed the strict differences between treaties concluded by States, and international or cross-border concession contracts concluded by governments and foreign corporations:

The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the

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5. See JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 120 (2008) (explaining that, as opposed to a contract, a “treaty lacks the type of normal domestic court of compulsory and universal jurisdiction, with the ability to levy damages and order performance”).

concession. It does not regulate in any way the relations between the two Governments.<sup>6</sup>

There are thus some conceptual limits to how far we can analogize contractual privity and contractual remedies to reshape our understanding of sovereign political authority and how this authority, in turn, informs the parameters of State conduct described in the design and interpretation of treaties.<sup>7</sup> There are limits to how far we can successfully and effectively extract and transpose the practical experiences and interpretive mandates of regime-specific centralized institutions that regularly navigate public policy and private interest tensions, such as in World Trade Organization (WTO) law, into another regime's atomized hybridity of treaties and disperse constellation of enforcement and compliance mechanisms (such as in international investment law).<sup>8</sup> These limits do not, however, rob private law or contract law analogies of analytical value when one assesses the continuing development of 'postmodern' international law,<sup>9</sup>

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6. Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objection, 1952 I.C.J. Rep. 93, 112 (July 22); see also Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 EUR. J. INT'L L. 289, 306-07 (2006) ("It is perfectly possible to outline testable hypotheses not only concerning the effectiveness of treaties . . . . If the explanatory power of a rationalist approach to IL is used for institutional design on an international plane, an analysis well founded in IL doctrine together with a differentiated analysis of states' incentives to comply is necessary. [However], one might question the application to moral issues of the rational choice approach as this stretches rational choice beyond its proper scope.").

7. See Friedrich Kratochwil, *The Limits of Contract*, 5 EUR. J. INT'L L. 465, 466 (1994) ("[C]onsiderably more than consent is required in order to explain the emergence of political authority and obligation. Contrary to the belief that what matters is the exchange, I shall argue that it *does* matter what we exchange and that, therefore, the farther we move from spot exchanges in a market to more complex social arrangements, the less is explained by the institution of contract as opposed to other elements.").

8. See Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 FLA. J. INT'L L. 51, 52-55 (2014) (explaining there are fundamentally different economic principles distinguishing international trade regimes from investment regimes and positing that while there is a straightforward transactional linkage between trade and investment, the conceptual differences between the two has resulted in the regimes having different international regulatory structures).

9. See generally Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 LEIDEN J. INT'L L. 727, 731, 748, 755 (2001) (analyzing the subjective nature of postmodern legal analysis and its

particularly vivid in the hybrid public-private domain of foreign investment contracts and their complex relationship with bilateral or regional investment treaties.<sup>10</sup> International investment law – as created from the exploding mass of cross-border investment treaties, foreign investment contracts, national legislation, and investor-State arbitral jurisprudence harnessing multiple sources of international law and domestic law – admittedly generates many complex intersections between the law of contract and the law of treaties.<sup>11</sup> It is in this light that

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importance in saving international law from politics and irrelevance); TAI-HENG CHENG, *WHEN INTERNATIONAL LAW WORKS* 45 (2012) (describing postmodern international law as a reflection of uncertainty about basic values, and uncertainty over whether international law ultimately controls outcomes); MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* 4, 6-7 (2012) (detailing the roots of 'postmodern anxiety' for international lawyers due to the expansion of international law to more subjects, actors, institutions, and treaties).

10. Among the scores of works examining the hybridity of investment law and the interplay of contract and treaty law in this regime, see Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367, 406-07 (2014) (pointing out that contemporary international investment law allows for treaty-based claims, contract-based claims, and statute-based claims, with treaty-based claims originating in public international law, contract-based claims most often calling for the application of private international law, and statute-based claims having the potential to implicate either public or private international law); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 287-88 (2010) (arguing that traditional commercial arbitration, seen in a private law context and used largely to settle contractual disputes, is now best understood in a public rather than private law context after the rise of investment treaty arbitration with the proliferation of BITs in the 1990s); José E. Alvarez, *The Once and Future Foreign Investment Regime*, in *LOOKING TO THE FUTURE* 607, 608-09 (Mahmoud H. Arsanjani et al. eds., 2010) (explaining that the international investment regime entails bilateral and regional investment agreements, which include both trade and investment provisions, as well as rules contained in multinational agreements designed for purposes other than international investment).

11. See Christian J. Tams, *The Sources of International Investment Law: Concluding Thoughts*, in *INTERNATIONAL INVESTMENT LAW* 319, 319, 322 (Tarcisio Gazzini & Eric De Brabandere eds., 2012) (commenting that questions of sources tend to be complex in international law and, in evaluating sources of international investment law, that investment law is regulated by multilateral treaties or particular rules governed by international laws such as for investment contracts); Florian Grisel, *The Sources of Foreign Investment Law*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW* 213, 213-14 (Zachary Douglas et al. eds., 2014) (highlighting the difficulty of identifying the source of foreign investment law before detailing the World Bank's enactment of Guidelines on the Treatment of Foreign Direct Investment, which was derived from

one vastly appreciates Professor Alan Sykes' *Economic 'Necessity' in International Law*,<sup>12</sup> which contributes to sovereign treaty makers' rational design and ongoing reform of international economic treaty language in a manner that would enable States to adjust and respond to economic emergencies without incurring the exorbitant costs of foreign investor compensation.

At the same time, however, it is also important to draw some caveats as to how far international adjudicators could realistically apply Professor Sykes' prescriptions *ex post*, particularly to pre-existing or current investment treaties that do not possess the linguistic elasticity that could enable Professor Sykes' proposed *a priori* interpretation of necessity clauses in these treaties.<sup>13</sup> As I have shown elsewhere, the doctrinal genealogy of the international law of necessity – the Janus counterpart of the theory of international obligation<sup>14</sup> – reveals frequent oscillations in language and meaning throughout State practice and treaty usage, with the classical form of necessity often invoked to enable sovereigns to repudiate any international responsibility.<sup>15</sup> To deliberately veer away from this classical understanding of the international law of necessity as a broad, self-judging, and overriding exception in international law, the International Law

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multilateral agreements, bilateral investment treaties, national investment codes, and laws drawn from arbitral awards); see also Francisco Orrego Vicuña, *Of Contracts and Treaties in the Global Market*, in 8 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 341, 357 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2004) (“[T]reaties and contracts, albeit different, pursue the same objective of ensuring the rule of law and the observance of legal commitments in the international community and are thus called to increasing interaction. To this end, treaties are becoming privatized by allowing a greater role for individuals in their operation, just as contracts are becoming public to the extent that states and international law extend their guarantees to their observance.”).

12. Alan O. Sykes, *Economic “Necessity” in International Law*, 109 AM. J. INT’L L. 296 (2015).

13. See *id.* at 319-21 (examining the use of the necessity defense in international investment cases and introducing approaches to effective implementation of the necessity defense in light of current investment treaty language).

14. See DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES 48 (2012) (“Early attempts to codify the law of international responsibility have always included a ‘necessity’ dimension.”).

15. See *id.* at 2 (stating that because States use the law of necessity as one way to alter their duty to comply with treaty obligations, their assertions of necessity have tended to oscillate between doctrinal order and anarchy).

Commission (ILC) deliberately placed such stringent conditions to its use only as a circumstance precluding wrongfulness under Article 25 of the Articles of State Responsibility, entitling States invoking this circumstance to temporarily suspend (and not reject) their performance of international obligations.<sup>16</sup> The International Court of Justice also supported this restrictive codification, with the Court declaring in its 1997 Judgment in the *Gabčíkovo-Nagymaros* case that the ILC formulation is “reflect[ive] of customary law.”<sup>17</sup> It is quite understandable that the United Nations’ principal judicial organ (the International Court of Justice)<sup>18</sup> restricted its acceptance of the international law of necessity based on the recommendations of the U.N. General Assembly’s designated research and international law codification body (the ILC),<sup>19</sup> as a mere circumstance precluding wrongfulness and not an overriding exception, when one considers that the international law of necessity gained so much of its currently stringent doctrinal contours from States’ historically repeated attempts to excuse, justify, or mitigate treaty breaches.<sup>20</sup> The modern international system created under the United Nations Charter purposely rejected any

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16. See Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 80 (2001) [hereinafter ILC Draft Articles] (limiting the use of the necessity doctrine to situations meeting a narrow set of conditions, in order to prevent a State’s abuse of the necessity invocation).

17. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶¶ 49, 51-52 (Sept. 25); see Malgosia Fitzmaurice, *Necessity in International Environmental Law*, 41 NETH. Y.B. INT’L L. 159, 162-63 (2010) (commenting on Article 25’s requirements to use the necessity doctrine and positing that the ICJ’s judgment in this case indicates that Article 25’s conditions reflect customary international law). I have argued in previous work, however, that though the Court’s thin declaration that the basic conditions stated in ILC draft article 33 (currently reproduced in the elements of ILC Article 25) “reflect customary international law,” the Court did so without citing to state practice, judicial decision, or other authorities except for the ILC’s draft formulation. DESIERTO, *supra* note 14, at 110-11.

18. U.N. Charter art. 92.

19. See G.A. Res. 174 (II), at 105 (Nov. 21, 1947) (establishing the ILC); ILC Draft Articles, *supra* note 16, art. 25 (stating the ILC’s restrictions on the law of necessity).

20. See Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1, 10-12 (2000) (highlighting cases that show States’ pleas of necessity as an excuse for noncompliance with a treaty, which ultimately resulted in the ILC codifying the concept’s contours).

unfettered meaning of sovereignty that enshrines any State's unlimited authority to act in the international sphere without regard to its responsibility to the international community of States.<sup>21</sup> A broad and self-judged international legal doctrine of necessity, if left untamed and unrestrained, could easily justify – if not incentivize – any State to take internationally irresponsible unilateral actions that violate duties of general cooperation mandated under the Charter.<sup>22</sup>

At its doctrinal baseline, therefore, the postmodern international law on necessity should be seen to operate restrictively only as a 'safety valve'<sup>23</sup> mechanism that enables

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21. See BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* 111-12 (2009):

Sovereignty today cannot mean unlimited freedom of action of states in the international sphere as this would be incompatible with the very idea of an international legal order . . . . At the San Francisco Conference, 'sovereign equality' of states (Article 2, paragraph 1 of the Charter) was deliberately adopted as a 'new term'. It is 'sovereign equality', not 'equal sovereignty' the Charter speaks of. The purpose of the new expression was clear: The idea of equality of states in law was given precedence over that of sovereignty by relegating the latter to the position of an attributive adjective merely modifying the noun 'equality'. In this combination, sovereignty was meant to exclude the legal superiority of any one state over another, but not a greater role played by the international community vis-à-vis *all* its members . . . . [I]n the system instituted by the Charter a state's right to independence is qualified by an obligation to promote and protect common values of the community.

(footnotes omitted).

22. See DESIERTO, *supra* note 14, at 317 (noting that the doctrine of necessity could "provoke greater moral hazards from States that might invoke unilateral humanitarian interventions as a pretext to use force for coercive or aggressive purposes"); Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19, 22 (2000) (highlighting the general obligation to cooperate found in the U.N. Charter).

23. See DESIERTO, *supra* note 14, at 23 (describing the doctrine of necessity as "better seen as a 'safety valve'" in modern times); Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337, 339 (2005) (stating that the law of necessity is a "safety valve" by which States can escape the harmful consequences of having to comply with the law's requirements); Maria Agius, *The Invocation of Necessity in International Law*, 56 NETH. INT'L L. REV. 95, 134 (2009) (declaring that necessity must never be used as a justification to indefinitely act contrary to international law); Julio Barboza, *Necessity (Revisited) in International Law*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE*



States to avail of a temporary respite from performing their international obligations. At the same time, however, there is nothing that prevents States from designing a necessity provision in a treaty that operates well beyond this baseline to enlarge the space for *justified* treaty noncompliance by States. When treaty parties assert that such a broader necessity provision is provided for in a treaty, it behooves international tribunals tasked with evaluating the asserted broader interpretation, to examine the actual nature of the treaty text and context, as well as discern the systemic policy implications to treaty regime participants if such broader exculpatory consequences are read into any alleged treaty-defined necessity clause, in a manner that supposedly creates for any State party to the treaty an *a priori* overriding exception against the institutionalized web of obligations and rights contemplated in these specialized treaty regimes.<sup>24</sup>

Any more expansive reading of the international law of necessity stands to undermine the cornerstone international legal principle of *pacta sunt servanda*,<sup>25</sup> where States' duties to perform

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MANFRED LACHS 27, 29 (Jerzy Makarczyk ed., 1984) (quoting an ILC Report which stated that the law of necessity must be prevented except in cases where it may be used as a "safety valve" to allow States a means of escape from complying with laws that would result in harmful consequences).

24. See Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 451 (2012):

[N]ecessity [should] be reoriented to facilitate and incentivize a more transparent appraisal of the competing interests, policies, and values that will virtually always be at stake, at least implicitly, in those international disputes in which necessity is pleaded . . . . In contemporary international law, the plea of necessity instead requires a contextual inquiry into, and candid consultation of, the unavoidable trade-offs among the often incommensurable interests, policies, and values embedded in international law . . . .

25. *Pacta Sunt Servanda* is defined as a principle in international law that means agreements must be kept. *Pacta Sunt Servanda Law & Legal Definition*, U.S. LEGAL, <http://definitions.uslegal.com/p/pacta-sunt-servanda/> (last visited Feb. 19, 2016); see also, e.g., Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, 8 (Sept. 25) (illustrating the implementation of the principle of *pacta sunt servanda*); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 270 (June 27) ("[I]f there is a duty of a State not to impede the due performance of a treaty to which it is a party, that is not a duty imposed by the treaty itself . . . . [T]his is a duty arising under customary international law independently of the treaty, . . . it is implicit in the rule *pacta sunt servanda*."); Johnstone, *supra* note 23, at

treaty obligations in good faith also includes a heavy presumption against the existence of any right of unilateral termination of a treaty.<sup>26</sup> Unlike domestic jurisdictions operating with more vertical enforcement systems, the operation of international law under a more ambiguity-laden “horizontal legal order”<sup>27</sup> with a very decentralized enforcement system inevitably lends itself to incidents of State noncompliance with international law.<sup>28</sup> Because a much broader scope to the postmodern international law of necessity inherently escalates the ambiguity and indeterminacy of treaty obligations, authoritative decision-makers and treaty appliers in international law should be deemed – as part of their international duty to give a decision in all circumstances avoiding a *non liquet* in international law<sup>29</sup> – to also assume a correspondingly stricter onus to elaborate their reasoning, rather than merely deferring to a State’s self-judged, broader, classical understanding and use of necessity in international disputes.

Moreover, an international tribunal’s analysis of the meaning and operation of asserted exceptions, such as economic necessity,

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339 (stating that the law of necessity is a means by which States can escape having to comply with a law’s requirements).

26. See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (establishing that every treaty must be performed in good faith); LORD MCNAIR, *THE LAW OF TREATIES* 493-94 (1986) (elaborating on the normal basis approach that a treaty “is intended to be of perpetual duration and incapable of unilateral termination”).

27. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 1 (1995).

28. See Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT’L L. 189, 190-91 (2006) (stating that international law’s structure makes it difficult to enforce laws at a sophisticated level, which sometimes results in operational noncompliance); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175, 188 (1993) (identifying various factors that account for States’ violations of treaties: “(1) ambiguity and indeterminacy of treaty language, (2) limitations on the capacity of parties to carry out their undertakings, and (3) the temporal dimension of the social and economic changes contemplated by regulatory treaties”).

29. See Non Liquet, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “*non liquet*” as a situation where the applicable law is unclear); Alfredo Mordechai Rabello, *Non Liquet: From Modern Law to Roman Law*, 10 ANN. SURV. INT’L & COMP. L. 1, 10 (2010) (asserting that in modern legal systems, a judge has a duty to adjudicate, and the principle rejecting instances of non liquet applies to international law).

also has to be undertaken according to the parameters of the tribunal's jurisdiction and the nature of the relief that the tribunal is authorized to grant to the disputing parties. Thus, in *Societe Commerciale de Belgique (Belgium v. Greece)*, while the Permanent Court of International Justice (PCIJ) recognized the binding legal force of international arbitral awards finding that Greece was responsible to pay the Belgian company bondholders after Greece defaulted on its sovereign bonds during the 1932 financial crisis, the PCIJ nevertheless purposely refrained from ruling on the issue of Greece's capacity to pay its debt as being outside the scope of its jurisdiction.<sup>30</sup> On the other hand in the *Brazilian Loans* case, while the Court held that "the economic dislocation caused by the Great War [World War I] has not, in legal principle, released the Brazilian Government from its obligations,"<sup>31</sup> the Court chose to pay "utmost regard" to the jurisprudence of French courts in order to ultimately determine the law governing the applicable currency (gold francs) for payment of Brazil's sovereign debts.<sup>32</sup> Similarly in the *Serbian Loans* case, the Court again held firm against releasing the Serbian Government from sovereign debt obligations despite the financial hardship of the World War I, although it conceded that such hardship could play its own role in the equities of

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30. As noted in *Société Commerciale de Belgique (Belg. v. Greece)*, Judgment, 1939 P.C.I.J. (ser. A/B) No. 78, at 177-78 (June 15):

Nor could submission No. 4 of the Greek Government be entertained if it were regarded as a plea in defence designed to obtain from the Court a declaration in law to the effect that the Greek Government is justified, owing to *force majeure*, in not executing the awards as formulated. For it is clear that the Court could only make such a declaration after having itself verified that the alleged financial situation really exists and after having ascertained the effect which the execution of the awards in full would have on that situation; in fact, the Parties are in agreement that the question of Greece's capacity to pay is outside the scope of the proceedings before the Court.

31. Payment in Gold of Brazilian Federal Loans Contracted in France (Fr. v. Braz.), Judgment, 1929 P.C.I.J. (ser. A) No. 15, at 120 (July 12).

32. See *id.* at 97-98, 124-25 (detailing that the Court must pay the "utmost regard" to the decisions of the French courts, because their jurisprudence aids in determining the rules applicable to the issue of how the payment of Brazilian bonds is affected by the reduction in the metallic value of the French franc).

international sovereign debt negotiations outside the purview of the Court:

It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations . . . .<sup>33</sup>

Years later in the *Gabcikovo-Nagymaros* case, the PCIJ's successor court, the International Court of Justice, inferred that even if it had been established that there was a state of necessity that impeded Hungary from performing its infrastructure obligations under the 1977 Treaty with Czechoslovakia, the evidence before the Court already showed that "Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission, to bring it about."<sup>34</sup> At that point, the Court observed judicial parsimony and purposely chose not to rule on and decide other questions related to the state of necessity, such as whether Hungary impaired an essential interest of Czechoslovakia and whether alleged Czechoslovakian breaches of the 1977 Treaty also contributed to the state of necessity.<sup>35</sup>

States have every reason to be wary of the moral hazard potential of necessity defenses, but it does not prevent them from including provisions on necessity in modern international treaties, to vindicate various policy objectives, such as to: 1) maintain treaty legality or applicability even in exceptional situations; 2) permit the State invoking necessity to modify its mode of treaty compliance during the state of necessity or emergency; 3) prevent abusive or disingenuous invocations of the

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33. *Payment of Various Serbian Loans Issued in France* (Fr. v. Kingdom of the Serbs, Croats and Slovenes), Judgment, 1929 P.C.I.J. (ser. A) Nos. 20/21, at 39-40 (July 12).

34. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 57 (Sept. 25).

35. *Id.* ¶ 58.

state of necessity by other treaty parties; and 4) restore treaty performance immediately after the termination of the exceptional situation.<sup>36</sup> States choose to incorporate these clauses purposely to regulate the conduct of parties to treaties during situations of necessity.<sup>37</sup> These choices can yield both productive potential for enabling flexibility and adaptation to economic crises, as well as perils of ambiguity that incentivizes States' morally hazardous conduct. As shown in Part II (Controlling Compensation Consequences of Necessity in Investment Treaties), Professor Sykes presents various rational choice theory-based innovations to the design of future necessity clauses especially for international economic treaties, which certainly resonate with many current global and scholarly initiatives (including my own) for reform and further development of international investment treaties and the reparations consequences arising from breach of investment treaties.<sup>38</sup> However, as discussed in Part III (Limits

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36. Diane A. Desierto, *Necessity and "Supplementary Means of Interpretation" for Non-Precluded Measures in Bilateral Investment Treaties*, 31 U. PA. J. INT'L L. 827, 833 (2010).

37. See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 377-78 (2d ed. 2015) (providing examples of when "investment treaties contain provisions that except contracting parties from core treaty obligations under exceptional circumstances in which a country's important national interests are at stake," such as the bilateral investment treaty (BIT) between the United States and Argentina, which states: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.").

38. See Sykes, *supra* note 12, at 310-11 (discussing various strategies for investors to eliminate all inefficient risk and how to contract for express exception to primary obligations). Note that Professor Sykes' position on temporary suspension of compensation owed by host States to investors during economic crises is similar to that of other authors who have previously considered or presented similar proposals for suspension of compensation. See, e.g., Alberto Alvarez-Jiménez, *The Interpretation of Necessity Clauses in Bilateral Investment Treaties After the Recent ICSID Annulment Decisions*, in *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY* 2010-2011, at 419, 420 (Karl P. Sauvant ed., 2012) ("The justification offered by the [necessity] clause is temporary and compensation is not, in principle, owed to investors during the given crisis, but some form of indemnity can exist in certain cases even if the BIT necessity clause is successfully invoked."); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 386 (2008) (stating that

to Reinterpreting Investment Treaty-Based Necessity), it is not at all easy, advisable, or otherwise legitimate under the methodological disciplines of treaty interpretation, to simply infuse Professor Sykes' rational choice and contract theory proposals into the "art and science" of the unitary system of interpretation established in the *précis* of Article 31 of the Vienna Convention on the Law of Treaties (VCLT),<sup>39</sup> especially when one has to consider the jurisdictional confines of disputes involving

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"NPM clauses raise two important questions with respect to state liability under a BIT," the first being "whether NPM clauses actually relieve states of responsibility, liability, and the duty to pay compensation for acts that would otherwise breach a BIT," and, second, assuming an NPM clause does relieve a state of liability, the period of time for which the NPM clause should be "deemed to apply and liability remain precluded"; Avidan Kent & Alexandra R. Harrington, *The Plea of Necessity Under Customary International Law: A Critical Review in Light of the Argentine Cases*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 246, 262 (Chester Brown & Kate Miles eds., 2011) ("A second possible direction is that the right to compensation will only be suspended, and, therefore will remain actionable at some point in the future.").

39. Article 31 of the VCLT has a canonical status both as a matter of treaty law and customary international law. See, e.g., *Legality of Use of Force* (Serb. & Montenegro v. Belg.), Judgment, Preliminary Objections, 2004 I.C.J. Rep. 279, ¶ 100 (Dec. 15) (stating that the court would proceed "in accordance with customary international laws reflected in [VCLT] Article 31"); *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 465, ¶ 99 (June 27) (stating that the court would proceed "in accordance with customary international law, reflected in [VCLT] Article 31"); *Territorial Dispute* (Libya v. Chad), Judgment, 1994 I.C.J. Rep. 7, ¶ 41 (Feb. 3) ("The Court would recall that, in accordance with customary international law, reflected in [VCLT] Article 31 . . . , a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."); *Kasikili/Sedudu Island* (Bots./Namib.), Judgment, 1999 I.C.J. Rep. 1044, ¶ 18 (Dec. 13) ("As regards the interpretation of that Treaty, the Court notes that neither Botswana nor Namibia are parties to the [VCLT], but that both of them consider that [VCLT] Article 31 . . . is applicable inasmuch as it reflects customary international law. The Court itself has already had occasion in the past to hold that customary international law found expression in [VCLT] Article 31 . . ."); *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep. 5, ¶ 41 (Feb. 3) ("The Court would recall that, in accordance with customary international law, reflected in [VCLT] Article 31 . . . , a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty."); *Oil Platforms* (Iran v. U.S.), Judgment, Preliminary Objections, 1996 I.C.J. Rep. 802, ¶ 23 (Dec. 12) ("The Court recalls that, according to customary international law as expressed in [VCLT] Article 31 . . . , a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

the interpretation of current “necessity clauses” in treaties pending before international tribunals. Neither would it be automatically intuitive or interpretively acceptable to graft meanings of necessity derived from the practice of other international economic tribunals (such as the WTO) as the controlling interpretation writ large for all kinds of individually-formulated necessity clauses in international investment treaties,<sup>40</sup> lacking any established nexus between provisions of these treaties from various international economic regimes, and absent the establishment of the same institutional, political, and judicial organs that enable centralized, repeat, and final adjudication and interpretation in world trade law.<sup>41</sup> Emulating the path of the deadlocked political organs<sup>42</sup> and

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40. See Kathleen Claussen, *The Casualty of Investor Protection in Times of Economic Crisis*, 118 YALE L.J. 1545, 1549-53 (2009) (finding that while international trade law and international investment law may harbor some shared language, each field developed separately from the other in a way that does not justify equating GATT Article XX with the ‘necessity provision’ in Article XI of the U.S.-Argentina BIT); Desierto, *supra* note 36, at 882-84, 886, 892-93 (critiquing the arbitral tribunal’s sudden transposition of GATT Article XX into the narrow language of Article XI of the U.S.-Argentina BIT).

41. However, as a matter of legal phenomena, international investment law norms are increasingly found in more of the recent regional trade agreements. For example, see Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT’L L. 1, 87 (2014):

[S]ome of the jurisprudence developed in international trade law as well as the discourse concomitant with these changes can serve as a form of blueprint for a future system of international investment law that takes these concerns seriously. The current system, having focused on individual rights, can evolve into one that takes contrasting societal goals seriously, while anchoring its collective interpretative exercise in the texts of existing investment agreements.

See also Tomer Broude, *Toward an Economic Approach to the Consolidation of International Trade Regulation and International Investment Law*, 9 JERUSALEM REV. LEGAL STUD. 24, 24 (2014) (analyzing Professor Jürgen Kurtz’s study of “the evolving relationship between international trade law and international investment law”). Whether or not the incorporation of trade law norms is the desired or ideal policy for investment law, however, is another matter. See Desierto, *supra* note 8, at 56 (cautioning against a mechanistic design of public policy solutions in international investment law by “mere transplant of the public policy interpretations, methodological approaches, and institutional solutions that have uniquely evolved within international trade law”).

42. See Manfred Elsig & Cédric Dupont, *Persistent Deadlock in Multilateral Trade Negotiations: The Case of Doha*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 587, 588-89 (Amrita Narlikar et al. eds., 2012) (recalling that “[d]ifferent

criticized adjudicative organs,<sup>43</sup> the WTO system may not necessarily yield the best system either for building in the treaty adaptation and regulatory flexibility needed by States in times of economic emergencies,<sup>44</sup> even if the combined use of trade and investment remedies admittedly expands the types of relief ordinarily available to private litigants.<sup>45</sup> The Conclusion (The Future of Economic Necessity in International Law) highlights the structural and compensatory innovations introduced by Professor Sykes as possible bases for future research for reforming the post-liability dimensions of investor-State disputes, as well as for rethinking the next generations of bilateral and regional investment treaties and investment chapters in the emerging behemoth clusters of economic partnerships and trade agreements, such as the proposed investment chapter in the pending Trans-Atlantic Trade and Investment Partnership<sup>46</sup> and

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expressions have been used along the way to give meaning to the difficulties in progressing in negotiations,” such as persistent deadlock).

43. See, e.g., William Magnuson, *WTO Jurisprudence & Its Critiques: The Appellate Body's Anti-Constitutional Resistance*, 51 HARV. INT'L L.J. ONLINE 121, 122 (2010) (arguing that the Appellate Body's "excessive use of narrow textualist argument tends to lead to short-sighted decisions that give little guidance[,] . . . [that its] decisions have increasingly interfered with sensitive democratic processes in sovereign countries[, and that] the opinions handed down by the [Appellate Body] have led countries to adopt trade-restrictive, rather than trade-liberalizing, measures").

44. See Robert Howse & Efraim Chalamish, *The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz*, 20 EUR. J. INT'L L. 1087, 1088 (2010) ("Yet, any attempt to merge trade and investment jurisprudence should not ignore the unique characteristics of the investment law regime. While the multilateral trading system can be described as centralized through its negotiation process and unified dispute settlement system with a final judicial instance, the investment field is much more diffused, both in terms of proliferation of investment treaties with various texts and multiple arbitral tribunals, which, using Kurtz's own words, 'prioritizes party autonomy, speed, and finality over the process of legal reasoning and justification' . . .").

45. See Sergio Puig, *The Merging of International Trade and Investment Law*, 33 BERKELEY J. INT'L L. 1, 43 (2015) ("It is worth noting that private interests can rely on importation and cross-fertilization [between international trade and investment law] without worrying too much about the long-term consequences for resulting case law.").

46. See *EU to Pursue the Most Ambitious Sustainable Development, Labour and Environment Provisions in TTIP*, EUR. COMMISSION (Nov. 6, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1393> (describing ongoing EU proposals for sustainable development and environmental provisions).



recently concluded Trans-Pacific Partnership and its investment chapter.<sup>47</sup>

## II. CONTROLLING COMPENSATION CONSEQUENCES OF NECESSITY IN INVESTMENT TREATIES

Professor Sykes points out several lessons from other legal regimes that contain a doctrine of necessity. From the standpoint of tort law, he states: “necessity’s purpose is to enable an actor to avoid a greater harm either by causing a lesser harm at the expense of the plaintiff or by violating an otherwise applicable legislative enactment . . . acts of necessity are efficient acts.”<sup>48</sup> Moral hazard concerns that individuals will take risks that benefit them but result in socially dangerous consequences can be remedied in various ways: 1) by imposing a compensation requirement that forces the defendant to internalize the costs of the act;<sup>49</sup> 2) preventing the defendant from availing of the privilege of acting out of necessity if he or she contributed to or otherwise authored the situation of necessity;<sup>50</sup> or 3) designing a liability rule that exempts the individual actor from liability if his or her act of necessity ultimately protects social interests and yields greater social benefits than costs.<sup>51</sup> From the perspective of contract law, Professor Sykes enumerates other useful considerations, such as: 1) the concept of expectation damages that facilitates efficient deviation from commitments in response to economic exigencies (e.g. “if the costs of performance to a promisor exceed the value of performance to the promisee, performance is socially inefficient. With a rule of expectation damages in place, and neglecting complications associated with litigation and error costs, a rational promisor will breach and pay damages if breach is efficient.”), assuming that computing compensation is “less costly or error prone”;<sup>52</sup> 2) renegotiating an

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47. TRANS-PACIFIC PARTNERSHIP, ch. 9, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.

48. Sykes, *supra* note 12, at 298.

49. *Id.* at 299.

50. *Id.*

51. *Id.* at 300.

52. *Id.*

incomplete contract where the default remedy available against the defendant is only specific performance;<sup>53</sup> or 3) applying impossibility or commercial impracticability doctrines, which, while generally inefficient in application, may be the “optimal contractual response [depending] not only on the efficiency of performance but also on the parties’ attitudes toward risk.”<sup>54</sup>

Several of the foregoing proposals pointed out by Professor Sykes are already present in certain areas of international investment law. However, many rigidities remain in the application of these proposals to situations of economic emergency faced by the host State to an investment. Liquidated damages clauses in foreign investment contracts, for example, purposely make host States internalize the costs of deliberately breaching guaranteed protections to investors, without regard for the State’s assertion of regulatory prerogative or the existence of an economic emergency.<sup>55</sup> A liquidated damages clause for a State’s breach of its foreign investment contract often

constitutes an amount agreed between the parties that is due without any obligation on the injured party to quantify its loss or damage[, which] . . . can significantly reduce political risk, by eliminating the uncertainty involved in any tribunal’s quantification of harm and the mustering of evidence on quantum of damages. The parties should, however, pay close attention to the compatibility of liquidated damages with the law applicable to the merits of the dispute.<sup>56</sup>

Liquidated damages clauses do not lend themselves to functional adaptability and liability mitigation that may be more socially equitable in the case of a host State contending with an economic emergency.

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53. *Id.*

54. *Id.* at 301.

55. MODEL PRODUCTION SHARING AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA AND TANZANIA PETROLEUM DEVELOPMENT CORPORATION AND ABC LTD FOR ANY AREA, arts. 12(a), 26(i) (2013), [http://www.tpdz-tz.com/Model%20Production%20Sharing%20Agreement%20\(2013\).pdf](http://www.tpdz-tz.com/Model%20Production%20Sharing%20Agreement%20(2013).pdf).

56. NOAH RUBINS & N. STEPHAN KINSELLA, INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION 59-60 (2005).

Even if a liquidated damages clause in a foreign investment contract could potentially put a fixed cap to the damages a host State is liable to pay an investor for deliberate breach of contract during an economic emergency, it is not a guarantee that the host State would be automatically insulated from any further compensatory liability. Investors' investment treaty-based claims are separate from pure foreign investment contract breach claims. When a host State is shown to have breached investment protection guarantees in an investment treaty (such as standards on non-discrimination, national treatment, most favored nation treatment, fair and equitable treatment, full protection and security, among others), the host State's breach of its investment treaty obligations gives rise to investors' rights to reparations for the breach,<sup>57</sup> as a result of arbitral tribunals' formulaic invocation of the *Chorzów Factory* definition of reparations.<sup>58</sup> In determining

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57. As noted in JESWALD W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT* 397 (2013):

Tribunals have arrived at this conclusion by finding that customary international law applies to the question of liability and compensation. In particular, they have relied on *Chorzów Factory*, in which the Permanent Court of International Justice stated that, according to customary international law, if a state has committed a wrong it is liable to pay reparations. The amount of such reparations must be sufficient to eliminate the consequences of the illegal act and to place the wronged party in the situation it would have been had the illegal act not taken place . . . . [H]aving determined the liability of the host state for violating a treaty treatment standard, an arbitral tribunal will next determine the compensation to be paid to the investor by comparing its actual situation after the breach with the situation it would have been in had no breach taken place. Through its decision on the amount of an award to be paid by the offending state, the tribunal will seek to place the injured investor in the same financial situation it would have been had no breach occurred.

(footnotes omitted).

58. See *Factory at Chorzów* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) ("Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."). I scrutinize this almost automatic – and largely uncritical – resort by investor-State arbitral tribunals to the *Chorzów Factory* standard in Diane A. Desierto, *Choice and Proportionality in Chorzów: The Outer Limits of 'Adequate' Reparations for Breaches of Investment Treaties' Non-Expropriation Provisions* (work in progress) (on file with author) (for presentation at the Jan. 30, 2016 Institute of Transnational Arbitration Academic Council Works-in-Progress Workshop in Washington D.C.).

the quantum of compensation due for a State's investment treaty breaches, arbitral tribunals have been critiqued for their imprecision, opacity, and at times, seeming arbitrariness.<sup>59</sup> As Thomas Wälde and Borzu Sabahi rightly observed:

Very little proper economic analysis has been carried out on the question of compensation in investment disputes. Nor have arbitral tribunals or the damages debate given much thought to it—partly because economic analysis of the larger impact of rules created by tribunals is at present still alien to both arbitrators and advocates, who mainly have a legal background.<sup>60</sup>

Given the prevailing climate of uncertainty and marked imprecision surrounding the methodology and design of appropriate compensation as reparations for investment treaty breaches and liquidated damages clauses in foreign investment contracts, Professor Sykes' insights on tort law-based

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59. See, e.g., Joshua B. Simmons, *Valuation in Investor-State Arbitration: Toward A More Exact Science*, 30 BERKELEY J. INT'L L. 196, 214 (2012) ("Although investor-state decisions are moving toward better explanations of valuation, deficient discussions of specific calculations remain a common exception to the trend . . . . In most cases . . . the failure to explain valuation adequately hints at a failure to address the issue methodically, thus exposing an award to greater skepticism." (footnotes omitted)); Charles N. Brower & Michael Ottolenghi, *Damages in Investor-State Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION 65, 67-68 (Arthur W. Rovine ed., 2008) ("[T]he distinction between 'damages' and 'compensation[]' [shows] terminological imprecision . . . [T]he two terms are employed differently in the context of expropriations . . . '[D]amages' are the remedy for unlawful State acts, while compensation is understood as a component of lawful behavior, for example as one of the conditions that render expropriations lawful." (footnotes omitted)); Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises*, 44 GEO. WASH. INT'L L. REV. 473, 494 (2012) ("Although arbitral tribunals refer to the general law of international responsibility to determine compensation for breaches of non-expropriation standards in investment treaties, such as the FET standard, the valuation process has been inconsistent, especially when an economic emergency is at issue."); Lee A. O'Connor, Notes and Comments, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 LOY. L.A. INT'L & COMP. L.J. 355, 356 (1983) ("[F]ull compensation is not currently, and indeed never was, the international standard . . . . [I]nternational law grants the primary responsibility of setting the amount of compensation to the taking state.").

60. Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages, and Valuation*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1049, 1054 (Peter Muchlinski et al. eds., 2008).

compensation for a tortfeasor's commission of an injurious act as a result of economic exigency, and on contract law-based expectation damages, provide useful initial conceptual guides for drafters of foreign investment contracts as well as investor-State arbitral tribunals.<sup>61</sup> These proposals, however, require further detailed elaboration to fully assist host States, both in framing optimal liquidated damage clauses in their foreign investment contracts, as well as in arguing the appropriate valuation method of compensation in investment treaty-based arbitrations.

Turning to Professor Sykes' proposal on using impossibility and commercial impracticability doctrines in contract law as possible paradigms for "economic necessity," it should be noted that these doctrines have already been considered for designing complex foreign investment contracts<sup>62</sup> and have also been litigated as part of the host State's domestic contract law alleged to apply to foreign investment contracts in investor-State arbitration.<sup>63</sup> Significantly, it has been reported that arbitral

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61. See Sykes, *supra* note 12, at 298, 300 (explaining how tort and contract law principles influence how the concept of necessity can contribute to international investment law). For ongoing reform initiatives relating to foreign investment contracts and/or investor-State dispute processes, see LORENZO COTULA, INVESTMENT CONTRACTS AND SUSTAINABLE DEVELOPMENT 80-81 (2010) (explaining that different international arbitration systems have reformed to improve transparency); STEPHAN W. SCHILL, REFORMING INVESTOR-STATE DISPUTE SETTLEMENT 1 (2015) (explaining that reform strategies have been contested because "different reform proposals often reflect different (political, ideological, or institutional) preferences that may not be globally shared"); and U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2015, at 108 (2015), [http://unctad.org/en/PublicationsLibrary/wir2015\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf) (explaining 50 countries have revised their IIAs to implement arbitration reforms).

62. See FREDERICK R. FUCCI, HARDSHIP AND CHANGED CIRCUMSTANCES AS GROUNDS FOR ADJUSTMENT OR NON-PERFORMANCE OF CONTRACTS 10 (2006), [http://www.arnoldporter.com/resources/documents/Hardship\\_Excuse\\_Article.pdf](http://www.arnoldporter.com/resources/documents/Hardship_Excuse_Article.pdf) (explaining most international investment agreements contain force majeure clauses that deal specifically with hardship); Erlend Bakken & Tonje P. Gormley, *Using Dynamic Petroleum Contract Clauses to Manage Risk in Volatile Markets*, in YEARBOOK OF INTERNATIONAL INVESTMENT LAW & POLICY 2009-2010, at 177, 188-89 (Karl P. Sauvant ed., 2010) (describing how the contract principles such as *rebus sic stantibus* are used by drafters to combat impracticability).

63. See, e.g., PSEG Global Inc. v. Republic of Turk., ICSID Case No. ARB/02/5, Decision on Jurisdiction, ¶ 85 (June 4, 2004) (discussing an asserted domestic contract doctrine of impossibility); Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶ 103 (Dec. 14, 2012) (discussing an asserted defense

tribunals are often not easily persuaded by impracticability and often require a difficult standard of proof.<sup>64</sup> Even in circumstances where a host State alleges some variant of change of circumstances under its domestic contract law (in response to an alleged contract breach elevated into an investment treaty breach due to an umbrella clause),<sup>65</sup> arbitral tribunals have been advised to “apply strict scrutiny in order to delineate opportunistic behavior and good faith reaction to contingencies.”<sup>66</sup> For similar reasons on the threshold of proof required, doctrines in treaty law such as supervening impossibility of performance<sup>67</sup> and fundamental change of circumstances<sup>68</sup> have not been as frequently applied or often successfully invoked by States in international disputes.<sup>69</sup> In the *Gabcikovo-Nagymaros* case, the

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of *rebus sic stantibus* under domestic contract law); Joseph Charles Lemire v. Ukr., ICSID Case No. ARB(AF)/98/1, Award, ¶ 25 (Sept. 18, 2000) (discussing a contract law doctrine of hardship and its consequences).

64. See Mark Augenblick & Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility, It's Not as Easy to Prove as You Might Believe*, 13 J. WORLD INV. & TRADE 59, 60 (2012) (stating that the current standard of impracticability is not easy to prove).

65. See Stephan W. Schill, *Umbrella Clauses as Public Law Concepts in Comparative Perspective*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 317, 332-34 (Stephan W. Schill ed., 2010):

The difference between preventing opportunistic behavior and the need to react flexibly to an unexpected change of circumstances can also be traced as a fundamental concern in virtually any domestic legal system. It is addressed by various concepts, including doctrines of *clausula rebus sic stantibus*, *force majeure*, impossibility, frustration, *imprévision*, or the *Lehre von der Geschäftsgrundlage*, and accepted in countless domestic legal systems. Similarly, various projects of codification of principles of contract law and international private law, as well as numerous commercial arbitration awards, draw a distinction between opportunistic behavior and contingencies and accept that unforeseen contingencies allow, under certain circumstances, a departure from contractual obligations.

(footnotes omitted).

66. *Id.* at 336.

67. VCLT, *supra* note 26, art. 61.

68. *Id.* art. 62.

69. See Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1973 I.C.J. Rep. 49, ¶¶ 34, 37, 40 (Feb. 2) (noting that a change of circumstances must be a significant one, and that the changes here were insufficient to effect the obligation to submit to the court's jurisdiction); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1973 I.C.J. Rep. 3, ¶¶ 24-25

International Court of Justice explicitly rejected Hungary's assertion of profound political changes and economic exigencies, the diminished economic viability of the investment project, and the development of new environmental norms as constituting any fundamental change of circumstances as contemplated in VCLT Article 62.<sup>70</sup> These contraindications from settled international arbitral and adjudicative practices militate heavily against relying on contract law doctrines of impossibility and commercial impracticability as possible defenses for States.

Apart from tort law and contract law, Professor Sykes also points to adopting treaty language from world trade law into investment law, specifically safeguard measures in Article IX (Emergency Action on Imports), and exceptions clauses in Article XX (General Exceptions), Article XXI (Security Exceptions), and balance of payments clauses in Articles XII-XV in the General Agreements on Tariffs and Trade (GATT).<sup>71</sup> Among the virtues he identifies from these clauses are:

[1] as regards Article XXI] narrowly tailored security exceptions, limited on their face to circumstances that are well defined and observable, can function reasonably well, even when made self-judging . . . [2] as regards Article XX,] preserving a broad degree of policy sovereignty for members to pursue nontrade objectives, while ensuring that they do not deliberately or inadvertently impose excessive costs on trading partners . . . [3] with respect to safeguard measures in Article XIX] permit[ting] WTO members to escape the economic consequences of negotiated import concessions that result in unexpected import surges that seriously imperil an import-competing industry [and such measures can be] efficient in a political sense [either

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(Feb. 2) (describing a situation in which an international court refused to accept an accusation of threat of force to contract due to issues of proof). As one commentator has observed, while virtually all international tribunals recognize fundamental change of circumstances as a defense, nearly none actually apply it. Malgosia Fitzmaurice, *Exceptional Circumstances and Treaty Commitments*, in *THE OXFORD GUIDE TO TREATIES* 605, 612 (Duncan B. Hollis ed., 2012).

70. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 104 (Sept. 25).

71. Sykes, *supra* note 12, at 302-03, 306-07.

because] it is in the parties' interest to permit temporary 'cheating' to preserve long-term cooperation [or that the] safeguard mechanism . . . makes politicians less skittish about negotiating trade concessions and leads to more concessions *ex ante*, even if some are temporarily revoked *ex post* [and 4) because economic exigencies] may at times arise because of balance-of-payments crises that threaten capital flight . . . [these] afford a justification from trade commitments in the WTO when they are properly linked to bona fide crises and properly time limited.<sup>72</sup>

It should first be noted that GATT exceptions clauses and GATT-based balance of payments clauses are already present in several of the newer international investment treaties involving well-established regional trade groupings and economic partnerships,<sup>73</sup> such as those of the Association of Southeast Asian Nations (ASEAN)<sup>74</sup> and the North American Free Trade Agreement (NAFTA).<sup>75</sup> Investor-State arbitral tribunals have not

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72. *Id.* at 303-07.

73. See U.N. CONFERENCE ON TRADE & DEV., THE PROTECTION OF NATIONAL SECURITY IN IIAS 86, 90, 92 (2009), [http://unctad.org/en/Docs/diaeia20085\\_en.pdf](http://unctad.org/en/Docs/diaeia20085_en.pdf) (describing the general exceptions and security exceptions language found in ASEAN as similar to the exceptions language found in GAAT); U.N. CONFERENCE ON TRADE & DEV., *supra* note 61, at 116 (noting the effect of the use of GATT-based balance of payment regimes by international trade groups and partnerships).

74. Comprehensive Investment Agreement, Assoc. of S.E. Asian Nations, art. 16, Feb. 26, 2009, [http://www.asean.org/storage/images/2013/economic/aia/ACIA\\_Final\\_Text\\_26%20Feb%202009.pdf](http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf). See substantially similar, if not identical, language in the Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation, Assoc. of S.E. Asian Nations–S. Korea, art. 11, June 2, 2009, <http://akfta.asean.org/index.php?page=investment-legal-text> (noting the similar language used in the Temporary Safeguard Measures clause); Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation, China–Assoc. of S.E. Asian Nations, art. 11, Aug. 15, 2009, [http://www.fta.gov.sg/acfta/asean-china\\_inv\\_agreement\(certified\\_copy\).pdf](http://www.fta.gov.sg/acfta/asean-china_inv_agreement(certified_copy).pdf) (noting the similar language in the Measures to Safeguard the Balance of Payments clause); Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation, Assoc. of S.E. Asian Nations–India, art. 12, Oct. 8, 2003, [http://www.asean.org/wp-content/uploads/images/pdf/2014\\_upload/ASEAN-India%20Investment%20Agreement%20%20-%20Scanned%20ASEAN%20version.pdf](http://www.asean.org/wp-content/uploads/images/pdf/2014_upload/ASEAN-India%20Investment%20Agreement%20%20-%20Scanned%20ASEAN%20version.pdf) (describing balance of payments in similar language).

75. North American Free Trade Agreement art. 2102, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).



yet had occasion to interpret these GATT-law based clauses, although various scholars have debated the merits and consequences of incorporating these kinds of clauses into international investment treaties.<sup>76</sup>

While in principle nothing should prevent States from incorporating GATT-based clauses into their international investment treaties, it is important to differentiate the ideological paradigm and structural contexts that animate the centralized interpretation of GATT-based clauses under the WTO's adjudicative organs, as against those which exist under the dispersed constellation of thousands of differently-worded investment treaties that are individually interpreted by various investor-State arbitral tribunals with no centralized appellate mechanism.<sup>77</sup> In the first place, because world trade agreements are premised on ensuring continued nondiscriminatory reciprocal market access between States, the remedies and defenses to breaches of these agreements primarily involve calibration and adjustment of governmental measures. When a WTO Member

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76. See Levent Sabanogullari, *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*, INV. TREATY NEWS (May 21, 2015), [https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/#\\_ednref6](https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/#_ednref6) (noting that the benefits of general exception clauses in IIAs provide enhanced regulatory flexibility and increased legal certainty in investment arbitration, that the main risks include abusive invocations, and that the rigidity of the new exceptions will actually limit or have no effect on the existing flexibility); Andrew Newcombe, *General Exceptions in International Investment Agreements*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 351, 357, 360 (Marie-Claire Cordonier Segger et al. eds., 2011) (debating the inclusion of GATT-based general exceptions clauses and arguing that their existence brings too much uncertainty to the system); Céline Lévesque, *The Inclusion of GATT XX Exceptions in IIAs: A Potentially Risky Policy*, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363, 370 (Roberto Echandi & Pierre Sauvé eds., 2013) (debating the role that general exceptions clauses play in international investment law and concluding that their role is limited and that they do not modify the obligation of states to compensate in cases of takings); Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 138, 145 (2013) (assessing the advantages and disadvantages of applying WTO-based necessity clauses to IIAs).

77. See Desierto, *supra* note 8, at 115-16, 116 n.271 (describing the lack of a centralized appellate mechanism as leading to uncertainty in future interpretation of GATT based clauses, due to the fact that each State's own interpretive regime will produce differing results).

State violates world trade law guarantees in any of its numerous multilateral treaties, the reparative sanction primarily imposed by the WTO adjudicative organs is to require the breaching Member's cessation of the violation with an order to bring its offending measure into compliance, coupled with the future possibility of imposing sanctions on the non-complying WTO Member by authorizing other WTO Members to take countermeasures or retaliatory actions against it to the extent of the assessed market access injury.<sup>78</sup> Cases at the WTO are brought by States seeking the WTO Member's adjustment or elimination of its challenged governmental measure precisely to restore the balance of mutually guaranteed foreign market access designed and contemplated in the WTO agreements. Repeat interpretive practices by the WTO Dispute Settlement Body (the adjudicative hat of the same WTO membership that wears its political hat through the WTO General Council) have lent more predictability and a greater sense (if not actual evidence) of a *jurisprudence constante* in WTO law.<sup>79</sup>

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78. See Marrakesh Agreement Establishing the World Trade Organization, Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes art. 19, Apr. 15, 1994, 1869 U.N.T.S. 3, [hereinafter Dispute Settlement Understanding (DSU)] (giving authority to adjudicatory bodies to bring inconsistent measures into compliance and stating that when an adjudicatory body finds "a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement"); see also Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT'L L. 763, 777-78 (2000) (describing article 19 of the DSU as following a two-tiered approach which first imposes an obligation on all WTO adjudicating bodies to recommend that WTO measures have not been in conformity, and second, gives those bodies the opportunity to suggest ways in which WTO members could bring their measures into compliance with their international obligations); Rachel Brewster, *The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement*, 80 GEO. WASH. L. REV. 102, 108-10 (2011) ("One of the major innovations of the World Trade Organization's ("WTO") Dispute Settlement Understanding [*supra*] is the regulation of sanctions in response to violations of trade law."); Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 777-81 (2004) (describing the suspension of the concessions remedy under the DSU as the icon of the new WTO system in that such teeth provide an operable threat deterring future violations).

79. See ISABELLE VAN DAMME, *TREATY INTERPRETATION BY THE WTO APPELLATE BODY* 197 (2009) (noting that predictability in the system originates from the emergence of a coherent body of case law, interpreting similar or identical treaty text, from a permanent dispute settlement system); David Unterhalter, *The Authority of an*

Investment treaty-based disputes, on the other hand, are not initiated between States under the investor-State dispute settlement mechanism created in international investment treaties. The object of this system is not to seek reparative adjustment of a challenged governmental measure, but to establish compensatory redress as the usual form of reparations for foreign investors that have already incurred economic injury, as a result of the challenged governmental measure breaching investment treaty standards of protection owed to such foreign investors.<sup>80</sup> States created the benefit of enabling their investor-nationals to directly resort to investor-State dispute settlement mechanisms against host States of investment that injure the economic value of their investment, because of the historically demonstrated tendency towards mass expropriations or erosions of foreign capital when investor protections are left solely to the self-interested discretion of political elites in host States,<sup>81</sup> as well as the threat (actual or perceived) of the lack of impartiality of host State tribunals when foreign investors seek economic recovery from such tribunals.<sup>82</sup> The atomized interpretation of numerous investment treaty standards by different investor-State arbitral tribunals results in diffuse and decentralized investment law-making and interpretation, in

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*Institution: The Appellate Body Under Review*, in A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO 466, 472-75 (Gabrielle Marceau ed., 2015) (noting that interpretive practices administered by the dispute settlement body were enacted to provide security and predictability to WTO law).

80. See Materials on the Responsibility of States for Internationally Wrongful Acts, art. 36 cmt, U.N. Doc. ST/LEG/SER.B/25 (2012) (illustrating the similar views of various international tribunals that damages for international wrongful conduct in violation of investment treaties or trade agreements is purely compensatory in function, directly emphasizing the right of a state that has suffered measurable, repressible economic injury to be made whole, and wholly foregoing focus on correction of the wrongful state action that purportedly caused that injury).

81. See generally KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES* (2010) (discussing at great length the history of treatment by sovereigns of foreign investors, the associated impacts of World War II, the Great Depression, the spread of communism, and the resurgence of globalization culminating in the evolution of multilateral investment agreements, NAFTA and the WTO).

82. Christoph Schreuer, *The Future of Investment Arbitration*, in LOOKING TO THE FUTURE 787, 787-88 (Mahnoush H. Arsanjani et al. eds., 2011).

stark contrast to the more coordinative processes between the political and legal organs of the WTO system.<sup>83</sup>

Given these differences, Professor Sykes' proposal to graft GATT-based clauses into international investment system needs considerably more analysis and deeper research into possible evolutions of the structural design of the international investment dispute settlement system. Purposely incorporating GATT-based exceptions into the language of international investment treaties may indeed create treaty-based pathways for host States to assert wider spaces for regulatory justification, but, left uncontrolled, they could also incentivize pretextual or morally hazardous conduct by States (especially those asserting the 'self-judged' nature of these exceptions or relying on the absence of settled *jurisprudence constante* among investor-State arbitral tribunals), enabling political elites in these host States to exact greater leverage in purposely inflicting greater economic injuries against foreign investors – noting that their challenged regulatory actions cannot be reversed as would ordinarily be the case for offending governmental measures under the WTO system. Even worse, introducing such ambiguous language in investment treaties could potentially spell the difference in foreign investors' evaluation of available legal protections between competing jurisdictions.<sup>84</sup> Reforming the international

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83. DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW 316 (2015).

84. It is of course well known that the precise 'incentivizing' or 'disincentivizing' effects of investment treaties on actual foreign investment capital inflows remains much debated among scholars. See Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT 225, 225-26 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (suggesting that, while evidence is inconclusive, the effects of BITs on flow of foreign-direct investment are unpredictable and minor as compared to the tremendous risk and effort they incur); Peter Egger & Michael Pfaffermayr, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra*, at 253, 253-55 (acknowledging the foregoing viewpoint, but finding empirical support for a significant and positive impact of BITs); Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit . . . and They Could Bite*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT, *supra*, at 349, 350-51, 374-75 (suggesting that "BITs act as more of a complement to than a substitute for domestic institutions," and that those benefiting from BITs actually need them the least).

investment system to recalibrate possible defenses to justify host States' regulatory actions ultimately requires more than just the incremental infusion of certain clauses into international investment treaties. Rather, more strategic, institutional, and thoughtful normative rethinking should be made on the actual nature and (the possibly narrower) justifiable scope of reparations that ought to be afforded to foreign investors in international investment law, also giving due consideration to the changing configurations between the traditional and new players (capital recipients and capital exporters alike) in the postmodern international economic system.<sup>85</sup>

### III. LIMITS TO REINTERPRETING TREATY-BASED NECESSITY

This article's main point of divergence from Professor Sykes' proposals lies with his proposals to reinterpret pre-existing necessity clauses in various international investment treaties, such as in the case of Article XI of the bilateral investment treaty between the United States and Argentina (U.S.-Argentina BIT),<sup>86</sup> which has been litigated extensively in concluded and pending investor-State arbitrations.<sup>87</sup> Quoting in more detail from Professor Sykes' article:

An adjudicator can defer to a nation claiming necessity or a similar defense (such as that under Article XI of the

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85. DIANE A. DESIERTO, REPARATIONS IN POSTMODERN INTERNATIONAL LAW: PROPORTIONALITY, EQUITY, AND JUSTICE (forthcoming) (on file with author).

86. Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment art. XI, Nov. 14, 1991, 31 I.L.M. 124 [hereinafter U.S.-Argentina BIT] ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to maintenance or restoration of international peace or security, or the Protection of its own essential security interests.").

87. For relevant case law on Article XI of the U.S.-Argentina BIT, see *infra* notes 91-92. The author's analysis of Article XI is laid out in more detail in DESIERTO, *supra* note 14, at 158-59, 170-71 (discussing States' use of the concept of emergency as revealed through analysis of international investment tribunal jurisprudence); Desierto, *supra* note 36, at 827-28 (arguing that customary doctrine on necessity has no interpretive utility for Article XI, and that a State invoking Article XI of the U.S.-Argentina BIT does so only to address international responsibility vis-à-vis the other State Party to this treaty, and that it cannot use Article XI to remove *lex specialis* substantive duties under the BIT to that State Party's investors).

US-Argentina BIT) but require that a measure of compensation be paid for the harm done due to breach of international obligations. The compensation can be deferred until such time as a state claiming necessity has recovered from the emergency situation sufficiently to be in a position to compensate without impairing its essential interests . . . an arbitral tribunal applying the necessity defense under CIL has the discretion to rule that compensation is required, at least after the period of necessity abates.

In my view, Article XI of the U.S.-Argentina BIT can be construed in this manner as well. Consider the phrase 'this treaty shall not preclude the application by either party of measures necessary' to maintain public order or protect an essential security interest. *If a measure such as the suspension of dollar pricing and indexing in Argentina is 'necessary', the treaty shall not preclude it. But once the measure is taken, the treaty is arguably silent on the question of compensation. Only if a compensation requirement would itself 'preclude' a 'necessary' measure does the text seem to rule out compensation.* It is difficult to imagine why a requirement of compensation, deferred until such time as the exigent circumstances abate and the nation has the resources to compensate, and appropriately limited in magnitude, would be preclusive.<sup>88</sup>

While there is little doubt that States can suspend obligations towards investors (including duties to compensate investors) in applicable states of necessity under Article 25 in relation to Article 27 of the ILC Draft Articles on State Responsibility,<sup>89</sup> it is not at all immediately evident nor apparent that this is the exact same meaning and consequence provided for and actually

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88. Sykes, *supra* note 12, at 320-21 (emphasis added).

89. See ILC Draft Articles, *supra* note 16, arts. 25, 27 & cmt. ("[I]nvocation of [necessity pursuant to Article 25] . . . is without prejudice to . . . compliance with the obligation in question, *if and to the extent that* the circumstance precluding wrongfulness no longer exists . . .") (emphasis added); see also Andrea K. Bjorklund, *Economic Security Defenses in International Investment Law*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009, at 479, 479-80 (Karl P. Sauvant ed., 2009) ("It is uncontroversial that in certain circumstances [including, *inter alia*, Article 25 'necessity' and 'circumstances precluding wrongfulness,'] a State may be excused from its obligations.").

intended under the brief one sentence of Article XI of the U.S.-Argentina BIT.<sup>90</sup> It is also not at all clear what Professor Sykes intends as the actual effect of preclusion, particularly as it relates to the alleged liability of a host State taking such a measure ‘necessary’ for essential security interests but which causes economic injury to investors. If a “treaty shall not preclude a measure,” could the measure at issue still be deemed to breach any other investment protection standards in the treaty as to give rise to the investor’s second-order claim of reparations (usually in the form of compensation)? Avoidance of any breach in the first instance (e.g. necessity as a first-order justification preventing any breach of the investment treaty from arising) is the interpretation Argentina has advanced (and continues to advance) in numerous cases a position which has been largely rejected by the majority of arbitral tribunals,<sup>91</sup> and accepted

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90. See U.S.-Argentina BIT, *supra* note 86, art. XI (“This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.”).

91. Jose E. Alvarez & Tegan Brink, *Revisiting the Necessity Defense: Continental Casualty v. Argentina*, in YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2010-2011, 319-375 (Karl P. Sauvant ed., 2011); see National Grid P.L.C. v. Argentina, Award, UNCITRAL, ¶¶ 251-57, 260-62 (Nov. 3, 2008) (finding that Argentina’s contribution to its own state of necessity precluded its successful invocation of the defense, but noting that, even if it were available, the defense would “only . . . be available to excuse *non-performance*,” not damages resulting from its actions taken during the state of necessity) (emphasis added); EDF Int’l S.A. et al. v. Argentina, ICSID Case No. ARB/03/23, Award, ¶¶ 1177-78 (June 11, 2012) (“[E]ven if Respondent’s conduct might be excused under the State of Necessity Defense, Respondent remains obligated to return to the pre-necessity *status quo* when possible. Moreover, the successful invocation of the necessity defense does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State.”); Suez et al. v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 249, 258, 265 (July 30, 2010) (rejecting Argentina’s plea of necessity and noting that the strict limits on the availability of the defense exist because “given the frequency of crises and emergencies that nations . . . face from time to time, to allow them to escape their treaty obligations would threaten the very fabric of international law and indeed the stability of the system of international relations”); El Paso Energy Int’l Co. v. Argentina, ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, ¶¶ 189, 203 (Sept. 22, 2014) (refusing to find reversible error by the Tribunal in finding that, because Article XI was applicable, no inquiry was necessary as to the availability of the state of necessity defense); Impregilo S.p.A. v. Argentina, ICSID Case No. ARB/07/17, Award, ¶¶ 344, 356-59, 361 (June 21, 2011) (denying Argentina’s

(partially or completely) by a few.<sup>92</sup>

Alternatively, however, it might also appear from Professor Sykes' proposal that a State invoking such a clause would not be prevented from taking any such measure subsumed therein even when the same facially violates any other investment treaty standards, subject to a compensation requirement that "can induce a state that deviates from its international obligations to 'internalize' a substantial portion of the cost."<sup>93</sup> Somewhat nebulously, Professor Sykes avers that compensation will itself be ruled out "if the compensation requirement would itself 'preclude'

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necessity defense plea after finding that, *inter alia*, long-term fiscal mismanagement by successive economic regimes substantially contributed to the situation of necessity); BG Group. v. Argentina, UNCITRAL, Final Award, ¶¶ 407-09, 412 (Dec. 24, 2007) (rejecting Argentina's defense of necessity and finding that even if "necessity were to justify some fair and non-discriminatory measure by Argentina, an obligation to compensate would still obtain by virtue of the BIT"); Enron Corp. & Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award, ¶¶ 333-34, 339 (May 22, 2007) (finding "that the crisis invoked [by Argentina did] not meet the customary law requirements of Article 25 of the Articles on State Responsibility, [and] thus concluding that necessity or emergency are not conducive to the preclusion of wrongfulness"); CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶¶ 367, 373, 380, 382 (May 12, 2005) ("Even if the plea of necessity were accepted, compliance with the obligation would reemerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present."). Note that the tribunal did not reach a finding on the issue of necessity, since the claimant was unable to prove liability for damages in the first instance in Metalpar S.A. & Buen Aire S.A. v. Argentina, ICSID Case No. ARB/03/5, Award on the Merits, ¶¶ 208, 211 (June 6, 2008).

92. LG&E Energy Corp. et al. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 263-64 (Oct. 3, 2006) (finding that Argentina was not liable for damages incurred during the state of necessity); Cont'l Cas. Co. v. Argentina, ICSID Case No. ARB/03/9, Award, ¶¶ 231-33, 236 (Sept. 5, 2008) (finding that Argentina properly invoked Article XI of the BIT and did not, as a result, breach any other investment treaty standard of protection owed to investors); Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Decision on Application for Annulment of the Argentine Republic, ¶¶ 356, 405-06 (July 30, 2010) (finding that the arbitral tribunal committed annulable error by failing to state reasons with regard to its Article XI analysis as well as its analysis of state of necessity under Article 25 of the ILC Draft Articles on State Responsibility); Sempra Energy Int'l v. Argentina, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, ¶¶ 209, 217-19 (June 29, 2010) (finding that the arbitral tribunal committed manifest excess of powers when it failed to apply the applicable law under Article XI of the U.S.-Argentina BIT).

93. Sykes, *supra* note 12, at 321.



a 'necessary' measure,"<sup>94</sup> without explaining how, and under what circumstances, that preclusion would occur and whether that effect of preclusion is justified. Would this mean, for example, that if an investment treaty standard (such as expropriation) itself provides for a compensation requirement (usually the Hull standard of full, adequate, and prompt compensation contained in many investment treaty provisions on expropriation),<sup>95</sup> that a State contemplating an expropriatory measure, but finding such compensation costs to be too prohibitive as to deter taking that measure, can nevertheless forego paying such compensation when it makes a case that the measure is 'necessary' under the terminology of Article XI? The clear danger to these *a priori* meanings attached to Article XI-type clauses written *ex post* in current investment treaties is that the very same ambiguity on the effect and consequences of 'preclusion' could very well create and incentivize the moral hazards and opportunistic behavior of States that Professor Sykes seeks to avoid.

In writing new exceptions clauses in future investment treaties or even adapting or reformulating current exceptions clauses when renegotiating current investment treaties, one can certainly be sympathetic to, if not agree with, Professor Sykes' advice – based on Article 27 of the ILC Draft Articles on the limited effect of suspension of obligations for circumstances precluding wrongfulness – that there should indeed be a possibility for States to defer payment of compensation in times of economic emergency or exigency until such emergency has abated and the nation has regained resources to compensate, and that such compensation should only be appropriately limited in magnitude.<sup>96</sup> Professor Sykes does not elaborate on the actual operational criteria to determine: 1) the definition of the

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94. *Id.*

95. See a survey of such expropriation clauses containing just compensation requirements in different treaties in 2 U.N. CONF. ON TRADE & DEV., EXPROPRIATION: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 40, 42-43 (2012), [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) (briefly describing the elements of the Hull standard of compensation and surveying the expropriation clauses of various treaties containing similar just compensation requirements).

96. Sykes, *supra* note 12, at 323.

'economic exigency'<sup>97</sup> that qualifies, in his view, to justify a State taking measures that purposely injure investors' property interests and rights; 2) the alleged termination point of the 'economic exigency' and the point of resource sufficiency for the host State that would justify resume paying compensation to investors (and when these payments can be feasibly made given all competing claims against a State's resources at any point in time, but especially more so in the reconstruction aftermath of economic crises);<sup>98</sup> and 3) the actual appropriate scale and level of compensation, and the permissible and legitimate valuation method to assess that compensation.<sup>99</sup> These are all hard and interrelated policy, fact, and legal questions that cannot be easily put to the resolution of investor-State arbitral tribunals on a case-to-case basis, and by inducing results through a forced reinterpretation of pre-existing necessity clauses such as Article XI of the U.S.-Argentina BIT. These are complex and challenging policy reform issues for investment treaty drafters and negotiators to begin with that require tremendous research, stakeholder consultation, and intergovernmental decision-making. Arbitral tribunals with their limited mandates to resolve investor-State disputes should not be expected to legislate these questions for States through their arbitral decisions, especially given the uncertain vagaries of available evidence and litigation strategies deployed by parties in

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97. As I have shown in previous work, even the very definition of 'economic emergencies' – what they are, when they arise, and when they terminate – does not have any clear consensus among security experts and economists. DESIERTO, *supra* note 14, at 145-49.

98. Evidently, at any given point, a State faces innumerable demands on its fiscal resources and the normative allocation and ordering of these resources to serve basic needs of its populations as well as service external debts to creditors. See JEROME B. MCKINNEY, *EFFECTIVE FINANCIAL MANAGEMENT IN PUBLIC AND NONPROFIT AGENCIES* 540 (4th ed. 2015) ("[F]iscal solvency means the provision of services at a level and with the amount of benefits that are adequate, equitable and stable. . . . [A]dequacy [means] suggesting the sufficiency of goods and services to maintain individual well-being; equity [means] guaranteeing equal access and opportunity to benefits from goods and services; and stability [means] referring to the maintenance of goods and services commensurate with the needs and expectations of citizens." (internal quotation marks omitted)).

99. See generally MARK KANTOR, *VALUATION FOR ARBITRATION* (2008) (explaining the broad spectrum of valuation approaches available).

individual investor-State arbitrations that can realistically limit how such questions are framed, analyzed, and resolved.

The main difficulty with superimposing these innovations into the interpretation of pre-existing necessity clauses such as Article XI of the U.S.-Argentina BIT is not so much that it utterly reinvents the wheel, so much as it introduces too many sudden new 'spokes' to it that could well jeopardize the intentions and expectations of State parties that concluded this treaty. There is nothing in the language of Article XI that encapsulates the effect of suspension of obligations (including compensation) that Professor Sykes seems to prefer, and there is likewise nothing in that same language that regulates the issue of compensation as a mode of reparations for breaches of investment treaties. There is a reason why the interpretation of Article XI has spilled so much ink among international legal scholars and remains much contested in pending investor-State disputes. On the one hand, as Argentina has repeatedly argued,<sup>100</sup> this provision could well be the basis for preventing *any* breach of the investment treaty from arising in the first place, thus nullifying any investor's right to claim reparations (in the form of compensation) for the investment treaty breach under international law. On the other hand, giving full rein to States to cherry-pick which investment treaty provisions it will be bound to, subject only to its own appreciation of what "essential security interests" are served by measures that deliberately injure if not eliminate investors' economic interests, is the beginning of the slippery slope to the rule of the exception in international law. Neither of these consequences can be fully desirable to the State and non-State actors who all use the protections, guarantees, and incentives fostered under the international investment treaty system to their respective political and economic advantage.

Leaving the issue of Article XI aside, however, there is much to be gained by arbitral tribunals from Professor Sykes' proposal on the compensation requirement. Compensation as a mode of reparations for breach of investment treaties to date remains

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100. *Cont'l Cas. Co. v. Argentina*, ICSID Case No. ARB/03/9, Award, ¶¶ 84, 86 (Sept. 5, 2008) (arguing if Article XI is applicable, no compensation is due because there is no treaty violation).

undertheorized.<sup>101</sup> Investor-State arbitral tribunals stand quite idiosyncratically among international tribunals in the frequency and high degree of compensation awards that they can issue for breach of investment treaty protection guarantees. One need only recall that the International Court of Justice's *Diallo* judgment strictly regulated the proof and evidentiary matters in its compensation phase.<sup>102</sup> Investment treaty breaches have gained interesting fame (if not some notoriety) for the ability of foreign investors to recover full fair market value compensation, in contrast to the limited ability of civilian populations to obtain full economic redress in times of armed conflict for violations of the laws of war that result in total property destruction, cultural devastation, or environmental harm.<sup>103</sup> As a mode of reparations, compensation is supposed to "cover any financially assessable

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101. See Ligia Catherine Arias-Barrera, *Lack of Definition of Compensation in International Investment Disputes for Non-Expropriation Claims: Is There an Appropriate Mechanism to Determine It?*, 10 REVISTA MERCATORIA 75, 89-91 (2011) (discussing the different approaches tribunals have taken in determining full compensation as a mode of reparations); Kaj Hobér, *Remedies in Investment Disputes*, in 3 INVESTMENT TREATY LAW 3, 10 (Andrea K. Bjorklund et al. eds., 2009) (highlighting the two situations compensation has been used in arbitration: expropriation and violations of fair and equitable treatment); Diane A. Desierto, *Contract, Governance, or a 'Public Private Partnership' Lens? Methodological Consequences in International Investment Law*, in PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 2014 (August Reinisch et al. eds., 2016) (forthcoming).

102. See Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 325, ¶ 61 (June 19) (fixing the amount of compensation for Mr. Diallo's non-material injury at US\$85,000, with the compensation for his material injury in relation to his personal property at \$10,000, and rejecting claims for compensation based on alleged material injury due to loss of professional remuneration during his detentions and following his unlawful expulsion).

103. See generally CRISTIAN CORREA, INTEGRATING DEVELOPMENT AND REPARATIONS FOR VICTIMS OF MASSIVE CRIMES (2014), <http://humanrights.nd.edu/assets/136618/correareparations2.pdf> (addressing the need for varying approaches beyond monetary compensation for mass crimes and international law violations); U.N. ENV'T PROGRAMME, PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT 50 (2009) (addressing the obstacles of civilian populations to recover full economic redress for violations of the laws of war); Roger O'Keefe, *Protection of Cultural Property*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 492, 502 (Andrew Clapham & Paola Gaeta eds., 2014) (discussing how, after World Wars I and II, various treaties required countries to give restitution for having taken or destroyed another country's cultural property).

damage including loss of profits insofar as it is established,” and only to the extent that damage is not made good by restitution.<sup>104</sup> Such compensation is “not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character . . . [while] it generally consists of a monetary payment . . . it may sometimes take the form, as agreed of other forms of value.”<sup>105</sup> The International Law Commission stressed that the quantification of compensable damage would depend “upon the content of particular primary obligations, an evaluation of the respective behavior of the parties, and, more generally, a concern to reach an equitable and acceptable outcome.”<sup>106</sup> Thus far, investor-State arbitral tribunals by and large have not yet elucidated clear standards or methods for quantification of compensable damage as a mode of reparations, which do address the concern of reaching equitable and acceptable outcomes for both investors and States alike.<sup>107</sup>

Professor Sykes rightly points out certain considerations that should be taken into account when designing appropriate compensation requirements that enable States to internalize some portion of the risk for acts taken in situations of economic necessity.<sup>108</sup> Prevailing challenges to valuation issues over compensation (especially for breaches of investment treaty standards other than expropriation, such as the fair and equitable treatment standard, which do not usually expressly stipulate a compensation standard as in expropriation) cannot be neglected. Excessive ‘reliance’ investments by investors may occur as a

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104. ILC Draft Articles, *supra* note 16, art. 36.

105. *Id.* art. 36, cmt. 4.

106. *Id.* art. 36, cmt. 7.

107. *But see* Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶ 272 (Nov. 2, 2015) (finding investors are bound only by compensation rules in the treaty of the state they are engaged with); Diane A. Desierto, *Beneficial Ownership and International Claims for Economic Damage: Occidental Petroleum v. Ecuador and Restoring Limits to Investor-State Arbitral Tribunals’ Jurisdiction Ratione Personae*, EJIL (Nov. 16, 2015), <http://www.ejiltalk.org/beneficial-ownership-and-international-claims-for-economic-damage-restoring-limits-to-investor-state-arbitral-tribunals-jurisdiction-in-occidental-petroleum-v-ecuador/> (discussing the clear limits the committee in the above decision placed on compensation in investor-state claims).

108. Sykes, *supra* note 12, at 321-23.

result of the expectation that State would indeed pay some degree of compensation for acts that infringe investor protections during economic emergencies. Political elites in host State governments who make the decisions to deliberately breach investment treaties and just pay compensation to foreign investors cannot necessarily be assumed to be making efficient choices that are socially beneficial to the citizens of the host State, nor choices that are ultimately responsible to the host State's investment partners in foreign investors. Beyond these rational choice theory considerations and utilitarian intuitions, however, more remains to be done – engaging both the empirical techniques and tools available under discipline of economics as well as other social science methods – to start giving real flesh by way of scientific method and normative content to the International Law Commission's vision of an "equitable and acceptable" compensation quantum to all parties in international disputes.<sup>109</sup>

#### IV. CONCLUSION

Professor Sykes' proposal for examining various models of economic exigency in tort law, contract law, and trade law has particular resonance and relevance in the continuing dialogue to reform international investment law, especially through the writing of new exceptions clauses in international investment treaties. The economic rationales for the particular form of an economic exception in either tort law, contract law, or trade law are by no means uniform, and they have respectively been shaped by repeated judicial and arbitral dialogue in each of these spheres. This is not to say that the juxtaposition of "economic necessity" from these models is impossible or lacks salience to the discipline of international investment law. Rather, it is critical that any attempt to infuse insights and institutional experiences from the former legal regimes must also take into account their *ultimate suitability* to the latter legal regime and its own evolving institutions and jurisprudence. It is always tempting to draw doctrinal parallelisms when textual similarities appear, and in that sense, it is altogether legitimate for investment law's

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109. ILC Draft Articles, *supra* note 16, art. 36, cmt. 7.

authoritative rule-makers to examine, test, and possibly incorporate these doctrinal transplants as innovations to international investment law. It is an entirely different matter, however, to instantiate “economic necessity” doctrines developed in other regimes into a forced reading of pre-existing (and briefly worded) necessity clauses such as Article XI of the U.S.-Argentina BIT. This article, on this front alone and on the basis of the unitary system of interpretation under VCLT Article 31, does not share Professor Sykes’ positional rereading of this particular necessity clause.

However, Professor Sykes’ most valuable contribution to the evolution of the concept of “economic necessity,” at least for international investment law, is his insight into the functions and limitations of compensation requirements as a mode of cost internalization for States. Given the continuing tension of navigating the threat of opportunistic behavior, pretextual or morally hazardous conduct by host States that could take advantage of very broadly-drawn exceptions clauses in investment treaties, Professor Sykes provides good conceptual parameters to guide tribunals in their assessment of compensation for investment treaty breaches. Thus far, most investor-State arbitral tribunals have not significantly dealt with the possibilities of deferring compensation or accepting other reparative modalities or forms apart from strict compensation such as, for example, legally preferential advantages in governmental contracts and processes, granting tax benefits and other non-monetary economic benefits in lieu of upfront compensation payments to investors, among others. Professor Sykes’ rational choice-driven analyses of expectation damages and compensation provokes a more thorough future stream of research on redesigning compensation as a mode of reparations in international investment law.

Finally, perhaps recognizing the futility of including “economic necessity” provisions, it is significant that the investment chapter in the Trans-Pacific Partnership Agreement<sup>110</sup> does not contain any explicit exceptions clause

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110. TRANS-PACIFIC PARTNERSHIP, *supra* note 47, ch. 9.

modeled after GATT exceptions such as GATT Article XX or XXI. Instead, this chapter provides for a denial of benefits clause<sup>111</sup> as well as explicit provisions on corporate social responsibility, investment, environmental, health, and other regulatory objectives.<sup>112</sup> This signals, at the very least, a marked discomfort on the part of States comprising around forty percent of the world's economy<sup>113</sup> with the ambiguity and moral hazard costs associated with current forms of economic necessity provisions in investment treaties. Neither does an "economic necessity" provision appear resonant or significant in current debates on the Trans-Atlantic Trade and Investment Partnership.<sup>114</sup> There is breathing space to judiciously plan a reformulation and recalibration of "economic necessity" and its functions, purposes, and consequences for international investment law, in a manner that engages, but also transcends, the rationalist assumptions and empirical applications of law and economics to international law.

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111. *Id.* art. 9.14.

112. *Id.* arts. 9.15-16.

113. See *Overview of the Trans Pacific Partnership*, OFFICE U.S. TRADE REP., <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Apr. 5, 2016) (stating that the parties to the Trans-Pacific Partnership "represent[] nearly 40 percent of global GDP").

114. For an example of economic necessity not being discussed as an issue related to the TTIP see *EU to Pursue the Most Ambitious Sustainable Development, Labour and Environment Provisions in TTIP*, EUR. COMMISSION (Nov. 6, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1393>. For an example of economic necessity only receiving one line of attention in an article on the TTIP, see Axel Berger, *The Transatlantic Free Trade Agreement – The Dispute Over Dispute Settlement*, GER. DEV. INST. (Mar. 4, 2014), <http://www.die-gdi.de/en/the-current-column/article/the-transatlantic-free-trade-agreement-the-dispute-over-dispute-settlement/>.